NO. 48643-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RONALD AHLQUIST,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable David E. Gregerson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's failure to properly instruct the jury deprived Appellant of a fair trial and constitutionally unanimous jury verdicts.

2. The trial court erred when it failed to enter written findings of fact and conclusions of law pursuant to CrR 3.5.

Issues Pertaining to Assignments of Error

1. Was Appellant deprived of his constitutional right to a fair trial and unanimous jury verdicts where the court failed to instruct that deliberations must include all jurors at all times?

2. CrR 3.5(c) requires written findings of fact and conclusions of law after a hearing on the voluntariness of a defendant s statement. No findings or conclusions were filed in this case. Must this case be remanded for entry of the required findings and conclusions?

B. STATEMENT OF THE CASE

The Clark County Prosecutor charged appellant Ronald Ahlquist with first degree manslaughter, second degree manslaughter, two counts of second degree identity theft, and one count of first degree theft. CP 21-23. The prosecution alleged that in 2013, Ahlquist took control of his ailing elderly father's monthly Social Security (SSI) benefits, with whom he lived, by applying for and then using a debit card to access those benefits

for his own use, and that in September and October 2013, he let his father starve to death by failing to provide proper care. CP 1-11.

A jury trial was held January 19-28, 2016, before the Honorable David E. Gregerson. RP[1] 1-1718. The jury found Ahlquist guilty of both manslaughter charges and both identity theft charges, and also found him guilty of second degree theft as a lesser included offense to the first degree theft charge. CP 94, 97, 100, 103, 107; RP 1705-08. The court imposed standard range sentences for each conviction, and Ahlquist appeals the judgment and sentence. CP 113-38; RP 1750, 1752.

At trial, with regard to the theft and identify theft charges, the prosecution presented evidence that Ahlquist admitted gaining access to his father's SSI benefits by applying for a debit card and spending at least some of the proceeds on himself. RP 1163-67. The defense, however, presented evidence that Ahlquist father and other family members approved of Ahlquist using the SSI benefits as he saw fit. RP 1443-44.

With regard to the manslaughter charges, the prosecution presented evidence that Ahlquist father had suffered from some form of dementia, probably early onset Alzheimer's, since at least 2008, and that he got progressively more addled by the disease until in September 2013 he

[1] There are fourteen consecutively paginated volumes of verbatim report of proceedings referenced collectively herein as "RP."

lacked both the desire and ability to provide any basic care for himself, such that he would have needed almost constant supervision. RP 468-85, 645, 874, 896, 904-06, 909-912. The defense, however, presented evidence that Ahlquist provided the level of care his father wanted, and that in the end his father's desire was simply to die at home, as he had, and that any neglect was self-imposed. RP 1356, 1488, 1517-18.

C. ARGUMENTS

1. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY THAT DELIBERATIONS MUST INCLUDE ALL TWELVE JURORS AT ALL TIMES DEPRIVED AHLQUIST OF A FAIR TRIAL AND UNANIMOUS JURY VERDICTS.

By failing to instruct that deliberations must involve all twelve jurors collectively at all times, the trial court violated Ahlquist's right to a fair trial and unanimous verdicts. Because the State cannot show this error was harmless beyond a reasonable doubt, this Court should reverse and remand for a new trial.

In Washington, criminal defendants have a constitutional right to trial by jury and unanimous verdicts. Wash. Const. art. I, §§ 21 & 22[2];

[2] Wash. Const. art I, § 21 provides:

> The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for

State v. Ortega–Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). One essential elements of this right is that the jurors reach unanimous verdicts, and that the deliberations leading to those verdicts be "the common experience of all of them." State v. Fisch, 22 Wn. App. 381, 383, 588 P.2d 1389, 1390 (1979) (citing People v. Collins, 17 Cal.3d 687, 552 P.2d 742 (1976)). Thus, constitutional "unanimity" is not just all twelve jurors coming to agreement. It requires they reach that agreement through a completely shared deliberative process. Anything less is insufficient.

The Washington Supreme Court recently concurred with the California Supreme Court's description of how a constitutionally correct unanimous jury verdict is reached, and how it is not:

> "The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them. It is not enough that 12 jurors reach a

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> waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash Const. art I, § 22 provides:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: . . .

> unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11. Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint."

State v. Lamar, 180 Wn.2d 576, 585, 327 P.3d 46 (2014) (quoting Collins, 17 Cal.3d at 693).

This heightened degree of unanimity necessitates, for example, that when a juror is replaced on a deliberating jury, the reconstituted jury must be instructed to begin deliberations anew. State v. Ashcraft, 71 Wn. App. 444, 462, 859 P.2d 60, 70 (1993) (citing CrR 6.5). Failure to so instruct deprives a criminal defendant of his right to a unanimous jury verdict and requires reversal. Lamar, 180 Wn.2d at 587-89; State v. Blancaflor, 183 Wn. App. 215, 221, 334 P.3d 46 (2014); Ashcraft 71 Wn. App. at 464. A trial court's failure to properly instruct the jury on the constitutionally required format for deliberating towards a unanimous verdict is error of constitutional magnitude that may be raised for the first time on appeal. Lamar, 180 Wn.2d at 585-86.

Sometimes jurors receive instruction that at least touches on the need for this heightened degree of unanimity, such as in California, where at least one jury was instructed they "'must not discuss with anyone any subject connected with this trial,' and 'must not deliberate further upon the

case until all 12 of you are together and reassembled in the jury room.'" Bormann v. Chevron USA, Inc., 56 Cal. App. 4th 260, 263, 65 Cal. Rptr. 2d 321, 323 (1997) (quoting BAJI No. 1540, a standardized jury instruction); see also, United States v. Doles, 453 F. App'x 805, 810 (10th Cir. 2011).("court instructed the jury to confine its deliberations to the jury room and specifically not to discuss the case on breaks or during lunch."). In this regard, the Washington Supreme Court Committee (Committee) on Jury Instructions recommends trial courts provide an instruction at each recess that includes:

> During this recess, and every other recess, do not discuss this case among yourselves or with anyone else, including your family and friends. This applies to your internet and electronic discussions as well — you may not talk about the case via text messages, e-mail, telephone, internet chat, blogs, or social networking web sites. Do not even mention your jury duty in your communications on social media, such as Facebook or Twitter. If anybody asks you about the case, or about the people or issues involved in the case, you are to explain that you are not allowed to discuss it.

WPIC 4.61 (emphasis added).

The Committee also recommends an oral instruction following jury selection explaining the trial process, and includes the following admonishment about the process after closing arguments are made:

> Finally: You will be taken to the jury room by the bailiff where you will select a presiding juror. The presiding juror will preside over your discussions of the case, which are

> called deliberations. You will then deliberate in order to reach a decision, which is called a verdict. Until you are in the jury room for those deliberations, you must not discuss the case with the other jurors or with anyone else, or remain within hearing of anyone discussing it. "No discussion" also means no e-mailing, text messaging, blogging, or any other form of electronic communications.

WPIC 1.01, Part 2.

The same instruction also provides:

> You must not discuss your notes with anyone or show your notes to anyone until you begin deliberating on your verdict. This includes other jurors. During deliberation, you may discuss your notes with the other jurors or show your notes to them.

Id.

The Committee has also prepared a Juror Handbook. WPIC Appendix A. It advises readers that as jurors, "DON'T talk about the case with anyone while the trial is going on. Not even other jurors." Id., at 9.

These WPIC-based admonishments, if provided, make clear that deliberations may only occur after all the evidence is in, and only then when jurors are in the jury room. What they fail to make clear, however, is that any deliberations must involve all twelve jurors. Thus, for example, in a four-count criminal trial, the pattern instructions do not prohibit the presiding juror from assigning three jurors to decide each count, with the understanding that the other nine jurors will adopt the conclusion of those three on that count for purposes of the unanimous

verdict requirement. Such a process violates the constitutional requirement that deliberations leading to verdicts be "the common experience of all of [the jurors]." State v. Fisch, 22 Wn. App. at 383.

Here, what instructions the court did provide to Ahlquist's jury failed to make clear the constitutional unanimity requirement that deliberation occur in the jury room, only then when all twelve jurors are present, and only as a collective.

The trial court's first on-the-record admonishment of Ahlquist's jurors occurred at the start of voir dire, and was given to the entire venire. RP 45-55. Nothing in this admonishment touched on how to engage in the deliberative process other than to note seated jurors are expected to engage in "careful deliberation." RP 49.

Once a jury was selected, the court explained the trial process to the seated juror, which included the follow:

> Finally, you'll be taken back to the jury room by the bailiff where you will select a presiding juror. The presiding juror will [preside] over your discussions of the case, which are called deliberations. You will then deliberate in order to reach a decision, which is called a verdict.
>
> Until you are in the jury room for those deliberations, you may not discuss the case with the other jurors or with anyone else or remain within hearing of anyone discussing it. No discussion also means no emailing, text messaging, blogging, or any other form of electronic communications.

RP 185-86.

Despite the Committee's recommendation to give the full WPIC 4.61 before every recess, it was never provided at Ahlquist's trial. This is not to say the court never admonished the jury. It did, but just not as recommended by the WPIC Committee. For example, following the conclusion of the first day of trial the court told the jury, "I'll remind you of the Court's orders and obligations regarding not discussing the case with anyone, including amongst each other and among family, friends, et cetera." RP 270. And on at least seven occasions during trial the court would remind the jury prior to a recess not to discuss the case. RP 555, 667-68, 775-76, 897, 1306, 1423, 1554-55. But on at least 23 other similar instances, no such admonishment was given. RP 305, 330, 366, 396, 436, 458, 581, 608, 688, 746, 852, 973, 1033, 1099, 1170, 1205-06, 1227, 1248, 1360, 1451, 1459, 1511, 1550,

In the written instructions the court read the jury informed them that "During your deliberations, you must consider the instructions as a whole." CP 64 (last page of Instruction 1); RP 1624. And the following instruction informs the jury that they "have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict." CP 65 (Instruction 2); RP 1625.

Instruction 26 instructed the jury on how to initiate and carry out the deliberative process. CP 90-91; RP 1635-38. Like the first two instructions, Instruction 26 also reminds the jurors they each have the right to be heard during deliberations. CP 90; RP 1636.

At the end of closing arguments, the trial court, after dismissing the alternate jurors, gave suggestions on how to deliberate;

> For those [jurors] still remaining, just one last oral instruction here. It's not even an instruction. It's a suggestion for deliberation of procedures[sic]. Now that you've heard the Court's instructions on the law and the closing arguments, you're ready to begin deliberations in any way that seems suitable to you and is consistent with the instructions I have given.
>
> However, I have a few suggestions that may help you proceed smoothly. [The court then encourages the jurors to respect the opinions of others, not to be afraid to speak up and express contrary views, be patience and allow others to speak their opinions, listen carefully to what the others have to say but don't be bullied or bully anyone else, take time to reach a verdict, and to decide the case for themselves].
>
> You should organize your discussions in whatever way you believe will be productive and fair. Some juries begin by reviewing the Court's instructions . . . ..Others begin by proceeding around the table with each juror in turn identifying the issues or concerns he or she would like to have discussed because that encourages free expression by all jurors before positions are taken.
>
> There is no set way to conduct a vote. You might vote by a show of hands, by voice, or by written ballot. Use a method that will encourage each juror to freely express opinions and conclusions.

RP 1697-99 (emphasis added).

Missing, however, are any written or oral jury instructions informing the jury of its constitutional duty to deliberate only when all 12 jurors are present, and only as a collective. Nor does the court ever admonishing the jurors that they were precluded from discussing the case with anyone during any recess, as recommended by WPIC 4.61 ("During this recess, and every other recess, do not discuss this case among yourselves or with anyone else, including your family and friends.").

The court's failure to instruct the jury that deliberation may only occur when all twelve jurors are present and only as a collective constituted manifest constitutional error. Lamar, 180 Wn.2d at 585-86. This error is presumed prejudicial, and the prosecution bears the burden of showing it was harmless beyond a reasonable doubt. Lamar, 180 Wn.2d at 588 (citing State v. Lynch, 178 Wash.2d 487, 494, 309 P.3d 482 (2013)).

The test for determining whether a constitutional error is harmless is "[w]hether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). Restated, "An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been

different had the error not occurred. A reasonable probability exists when confidence in the outcome of the trial is undermined." State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted). It is undermined here because the prosecution cannot meet its burden to show harmlessness.

That Ahlquist's jurors had opportunities for improper deliberations is not just theoretical. For example, the court's minutes show the jury "Retires to deliberate upon a verdict at 12:22 pm." *CP 186* [3] (page 41 of the trial minutes). It also shows the jury submitted a jury question at 2:58 pm and it took the court until 3:23 pm to convene the parties and provide an answer. RP 1700-04. Thereafter the jury reached a verdict by 4:50 pm. *CP 187* (page 42 of trial minutes). What is not clear from the record is whether the jurors deliberated the entire four-plus hours, or instead broke for lunch or breaks. In light of the brief period of deliberation, there is a reasonable probability that to speed up the process so they could conclude their service, the presiding juror divided the jury into groups of less than twelve, with each groups assigned to decide certain charges with the

[3] Counsel has filed a supplemental designation of clerk's papers designating the 43 pages of trial minutes, sub no. 305D. Based on past experience counsel anticipates the Clark County Superior Court Clerk's office to assign index numbers 146-188 to this document. The italicized *"CP"* cite provided is what counsel expects to be the index number for that page.

understanding that each group would then adopt the conclusions reached by the others. Such a process would clearly violate the "common experience" requirement for constitutionally valid unanimity, but not the instructions provided by the court. Lamar, 180 Wn.2d at 585. To the contrary, the trial court's concluding remarks to the juror encouraged them to deliberate "in any way that seems suitable to you and is consistent with the instructions[.]" RP 1697. No instruction told the jury such deliberations were not allowed.

There is also the very likely scenario of one or more jurors simply leaving to briefly use a bathroom while the remaining jurors continued to discuss the case. The jury was never instructed not to engage in such improper deliberations. As such, the jury was left ignorant about how to reach constitutional unanimity.

In light of the court's written and oral instructions, which only limited their ability to discuss the case to fellow jurors, there is a reasonable possibility some jurors discussed the case without the benefit of every other juror's presence, whether over lunch, simply walking to and from the jury room, or even in the jury room itself. Nothing informed them such discussions were not allowed. There was nothing provided to inform them their verdicts must be the product of "the common experience of all of them." Fisch, 22 Wn. App. at 383. If even just one of the jurors

was deprived of deliberations shared by the other eleven, then the resulting verdict is not constitutionally "unanimous." Lamar, 180 Wn.2d at 585; Collins, 17 Cal.3d at 693. This Court should reverse and remand for a new trial. Lamar, 180 Wn.2d at 588.

2. THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER CrR 3.5.

The court held a hearing under CrR 3.5 to determine admissibility of Ahlquist's statements to law enforcement officers. RP 194-212, 332-38. The court, however, failed to enter written findings or conclusions as required by CrR 3.5. That court rule provides in part:

> (c) Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefore.

Under the plain language of CrR 3.5, written findings of fact and conclusions of law are required. Here, the court followed CrR 3.5's mandate to hold a hearing on the admissibility of the statements and rendered an oral decision, but failed to enter the required written findings and conclusions.

The oral decision is "no more than a verbal expression of [the court's] informal opinion at that time. It is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned." Ferree v. Doric Co., 62 Wn.2d 561, 567, 383 P.2d 900 (1963).

Consequently, the court's decision is not binding "unless it is formally incorporated into findings of fact, conclusions of law, and judgment." State v. Hescock, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999) (quoting State v. Dailey, 93 Wn.2d 454, 459, 610 P.2d 357 (1980)).

"When a case comes before this court without the required findings, there will be a strong presumption that dismissal is the appropriate remedy." State v. Smith, 68 Wn. App. 201, 211, 842 P. 2d 494 (1992). Although Smith involved a CrR 3.6 hearing, its reasoning applies equally to CrR 3.5 hearings. See Smith, 68 Wn. App. at 205 ("[T]he State's obligation is similar under both CrR 3.5 and CrR 3.6). But where no actual prejudice would arise from the failure of the court to file written findings and conclusions, the remedy is remand for entry of the written order. State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998). Here, no findings of fact and conclusions of law were filed after the CrR 3.5 hearing, and remand for entry of the findings and conclusions is appropriate. Id.

3. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Ahlquist "lacks sufficient funds to prosecute an appeal" and was therefore indigent and entitled to appointment of appellate counsel and production of an appellate record at public expense. CP 141-42. If Ahlquist does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. RCW 10.73.160(1) states the "court of

appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State's request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id. Accordingly, Ahlquist's ability to pay must be determined before discretionary costs are imposed. Without a basis to rebut the trial court's determination that Ahlquist is indigent, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

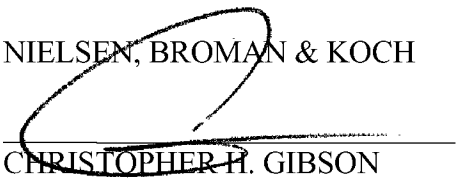
D. CONCLUSION

The trial court's failure to properly instruct Ahlquist's jury about the deliberative process required to reach constitutionally valid verdicts requires reversal and remand for a new trial.

DATED this 29th day of September 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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